

1. Did claimant suffer accidental injury arising out of and in the course of his employment? Respondent acknowledges that claimant suffered accidental injury arising out of and in the course of his employment to his left ankle and foot on the date of accident, but argues that claimant suffered intervening injuries with a new employer resulting in his current need for medical treatment.
2. Did the ALJ exceed his authority in granting temporary total disability compensation? Respondent argues that claimant did not comply with the requirements of K.S.A. 44-534a(a)(1) in that claimant failed to provide written notice of the specific benefit being requested.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds that the order of the ALJ with regard to claimant's entitlement to temporary total disability compensation should be reversed, but respondent's appeal with regard to the remaining issues should be dismissed.

Claimant proceeded to preliminary hearing in front of the ALJ requesting ongoing medical treatment with Dr. Schaper in the form of an MRI of claimant's left ankle. At the preliminary hearing, respondent's attorney acknowledged that there was no dispute regarding the compensability of the original injury.<sup>1</sup> Respondent's dispute regarding claimant's request for medical treatment stems from the argument that claimant suffered an intervening injury while working for a subsequent employer and, therefore, claimant's need for ongoing medical care stems from that injury and not the May 4, 2004 injury suffered with respondent.

The ALJ in the Preliminary Decision of October 28, 2005, stated:

It seems that a new MRI of the affected area will clarify the situation, as Dr. Schaper supposes, so it is authorized and his analysis of it and the situation should be provided, along with his opinion as to the effect of the two injuries and their role in Claimant's current condition, along with Claimant's current recommended restrictions, since the others are rather severe. Temporary total disability should be paid from the date of application for preliminary hearing.

The final result of the Preliminary Decision is that claimant is being referred for medical treatment in the form of an MRI, with the ALJ making no determination regarding whether claimant's ongoing need for medical care stems from the May 4, 2004 accident or claimant's later injury suffered with a new employer. Rather the ALJ appears to be awaiting the results of the MRI and Dr. Schaper's opinion as to the effect of the separate injuries. In that regard, it would appear that respondent's appeal of this issue is premature. The ALJ has not decided whether claimant's need for medical care is associated with the accident of May 4, 2004, but awaits a medical opinion on that point. The Board, therefore, finds that respondent's appeal of that issue should be dismissed. The Board is limited in its review of administrative law judges' decisions to the questions of law and fact as presented to the administrative law judge and as determined by the administrative law judge.<sup>2</sup> The Board, therefore, dismisses respondent's appeal of this matter.

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<sup>1</sup> P.H. Trans. (Oct. 20, 2005) at 5.

<sup>2</sup> K.S.A. 44-555c(a) and K.S.A. 2004 Supp. 44-551(b)(1).

The ALJ in the Preliminary Decision also awarded temporary total disability compensation to claimant. K.S.A. 44-534a limits the right of the Board to consider issues on appeal from preliminary hearing orders.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide both timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?<sup>3</sup>

In this instance, the Board does not find claimant's entitlement to temporary total disability compensation to fall under any of the above headings which would grant jurisdiction of the Board to review the ALJ's preliminary hearing order.

The Board, however, may review preliminary hearing orders where it is alleged that an administrative law judge exceeded his or her jurisdiction or authority in granting or denying the benefits requested.<sup>4</sup>

In this instance, claimant was awarded temporary total disability compensation. K.S.A. 44-534a(a) requires that at least seven days prior to the filing of an application for preliminary hearing, the applicant must give written notice to the adverse party of the intent to file the application, with the notice of intent containing "a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing."<sup>5</sup> The seven-day demand letter issued by claimant in this matter requested the MRI for claimant's left ankle. There is no mention in the seven-day demand letter of a request for temporary total disability compensation. It was not until the parties appeared at preliminary hearing that respondent was advised that claimant was requesting temporary total disability compensation, along with the requested medical treatment.

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<sup>3</sup> K.S.A. 44-534a(a)(2).

<sup>4</sup> K.S.A. 2004 Supp. 44-551.

<sup>5</sup> K.S.A. 44-534a(a)(1).

The Board has held in the past that a failure to specifically address the benefits being requested in the notice of intent letter will result in a denial of benefits for having failed to follow the appropriate due process procedures. The Board, in *Kilpatric*,<sup>6</sup> reversed an administrative law judge who granted temporary total disability compensation without that specific request being included in the notice of intent letter. That same circumstance exists here, as the request for temporary total disability compensation came as a surprise at the preliminary hearing, with no prior notice included. The Board finds that claimant's failure to specifically identify the issues in contention is fatal to his request for temporary total disability compensation. Therefore, the award by the ALJ of temporary total disability compensation from the October 28, 2005 Preliminary Decision should be reversed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated October 28, 2005, should be, and is hereby, reversed with regard to claimant's request for temporary total disability compensation, but remains in full force and effect with regard to the requested MRI examination and opinions from Dr. Schaper.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 2006.

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BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant  
Frank D. Eppright, Attorney for Claimant  
Samantha N. Benjamin, Attorney for Respondent and its Insurance Carrier  
Robert H. Foerschler, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>6</sup> *Kilpatric v. Bonanza, Inc.*, No. 253,097, 2000 WL 1708335 (Kan. WCAB Oct. 26, 2000).